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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 27 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

COMMENTS OF NEW LIFE EVANGELISTIC CENTER, INC.

New Life Evangelistic Center, Inc. (NLEC) is the licensee of two full power television stations, KNLC, St. Louis and KNLJ, Jefferson City, MO, eight LPTV stations and the licensee or permittee of various commercial and noncommercial radio stations in Missouri and Arkansas. It is an applicant for full power Channel 34 at Eureka Springs, Arkansas.¹ It attempted to be an applicant for full power Channel 14 at Pittsburg, Kansas but was unaware that Pittsburg, KS was close enough to Kansas City, MO to fall within the "freeze" imposed in July 1987. Accordingly, NLEC did not ask for a waiver of the freeze, when it filed, which filing was in response to a deadline for filing for all of the last unoccupied analog channels. Because it did not ask for a waiver, its application was returned in October

¹As these Comments are being written, it appears those mutually exclusive applications will go to auction.

1996. See Attachment A. At the time of NLEC's filing (September 1996), two other applicants filed for Channel 14 at Pittsburg and requested a waiver of the freeze. Their applications are pending and would appear on an A Cut-Off List pursuant to 47 C. F. R. § 73.3572(d), in response to which mutually exclusive applications could be filed. NLEC made the decision in early November 1996 to await the A Cut-Off and file for Channel 14 then. That Cut-Off List has never been published. Thus, NLEC has never had the opportunity to file for Channel 14 that the Commission's Rules afford it. It objects to any Settlement Procedure or Auction mechanism that excludes it from participation.

There is nothing that has prevented the Commission from publishing the A Cut-Off List between adoption of the Balanced Budget Act and now, the eve of the settlement deadline set by Congress. In this proceeding, the Commission has observed in its Notice of Proposed Rulemaking:

With respect to competing applications for initial licenses for commercial radio and television stations filed with the Commission before July 1, 1997, section 309(l) provides: (1) that the Commission has the authority to conduct a competitive bidding proceeding pursuant to section 309(j) to award such licenses or permits; (2) that it must treat persons filing such applications as the only persons eligible to be qualified bidders; and (3) that, for a period of 180 days beginning on the date of enactment of the Balanced Budget Act of 1997, the Commission must waive any provision of its regulations necessary to permit such persons to enter into an agreement to procure the removal of a conflict between their applications. Notice at ¶ 7.

The Commission went on to say:

New section 309(l) of the Communications Act expressly governs "competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997," and provides that "the Commission shall . . . have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit."

Based upon its language, we tentatively conclude that new section 309(l) accords the Commission the discretion to use competitive bidding to select among pending mutually exclusive applications filed before July 1, 1997. The Conference Report states, however, that the section "requires the Commission to use auctions for mutually exclusive applications filed before July 1, 1997." We therefore seek comment on whether the Balanced Budget Act of 1997 should be construed to require auctions for pre-July 1, 1997 applications, particularly since such applications are not included in the listed exemptions to the requirement for auctions under amended section 309(j) of the Act. For purposes of this NPRM, however, we assume that we have discretion regarding the use of auctions to resolve mutually exclusive applications filed before July 1, 1997. Notice at ¶ 13.

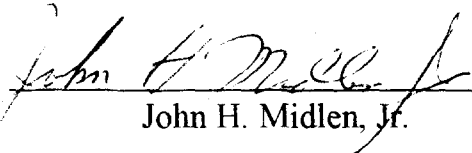
As is abundantly clear from the foregoing, the Balanced Budget Act does not cover all circumstances. For example, the situation where a window encompassed July 1, 1997 within its beginning and ending dates. The Commission is partially correct when it says: "We note at the outset that pending applicants have no vested right to a comparative hearing under the statute. Even in the absence of legislation expressly authorizing the application of the new procedures to pending applications, we have broad rulemaking authority to revise our processing rules and to apply the new rules to pending applicants. Such authority depends not on whether the new rules comport with the applicants' expectations based upon prior law, but on *whether the determination to change our rules is arbitrary and capricious.*" Notice at ¶ 14 (emphasis supplied). It is not the Commission's province to determine whether what it does is arbitrary or capricious. *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1980). That belongs to the court, just as in *Sea Island* the court instructed that it is not the FCC's function to employ the substantial evidence test. *Id.* at 242.

Whether Commission action passes appellate muster will depend on, *e.g.*, whether it

is rational, whether it is articulated and connected to the facts² and whether the Commission follows the law and its own rules. *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356 (D.C. Cir. 1979)("It is a 'well-settled rule that an agency's failure to follow its own regulation is fatal to the deviant action.") Here the Commission's rules have afforded NLEC the right to apply for Channel 14 in Pittsburg. These are rights that have vested; unlike such rules as waiver of the milage factor vis a vis the freeze or the amount of money that may be paid in settlement.

For the foregoing reasons, the Commission should publish A Cut-Off Lists for all applications not heretofore on said lists, as 47 C.F.R. § 73.3572(d) requires, accept mutually exclusive applications and proceed to settlement and/or auction as the case may be.

NEW LIFE EVANGELISTIC CENTER, INC.

By: 
John H. Midlen, Jr.

Its Counsel

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202-333-1500
January 27, 1998³

²*Motor Vehicle Mfrs Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983); *Philadelphia Gas Works v. FERC*, 989 F.2d 1246, 1251 (D.C. Cir. 1993); *Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1304 (D.C. Cir. 1983)

³Personal illness of counsel prevented these Comments from being filed yesterday; leave to file one day out of time is requested.

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New Life Evangelistic
Center, Inc.
c/o John H. Midlen, Jr., Esq.
3238 Prospect Street, N.W.
Washington, D.C. 20007-3214

Re: Channel 14
Pittsburg, KS

Dear Mr. Midlen:

This is with respect to your above-captioned application for a construction permit for a new television station to operate on Channel 14 in Pittsburg, Kansas, which you submitted for filing March 22, 1996.

Your application cannot be accepted for filing and is being returned. On July 16, 1987, the Commission imposed a "freeze" on the acceptance of applications for new television stations within the minimum co-channel separation distances from 30 designated television markets. Advanced Television Systems, Mimeo No. 4074 (released July 17, 1987) (hereafter referred to as the "Freeze Order"). The "freeze" was imposed because the high densities of existing television stations in those markets limited the spectrum available for high-definition television and advanced television ("ATV") service there, and the Commission wanted to preserve its spectrum allocation options for such ATV use. Consequently, all television proposals for communities within 174.5 miles (280.8 kilometers) (for UHF) of Kansas City, Missouri, are subject to the "freeze". Since Pittsburg is 115 miles (185.7 kilometers) from Kansas City, it is therefore within the "freeze" area.

Accordingly, your application IS RETURNED as unacceptable for filing.

Sincerely,

Clay C. Pendarvis
Chief, Television Branch
Video Services Division
Mass Media Bureau

sva/MMB"newlife"
Typed: 10-7-96

Attachment A